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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
230 SOUTH DEARBORN ST.
CHICAGO, ILLINOIS 60604

JAN 18 1991

REPLY TO ATTENTION OF:

Jay Christopher
Director, Superfund Program
Conoco Inc.
P.O. Box 2197
Houston, Texas 77252

RE: Great Lakes Asphalt, Zionville, Indiana
Site No. FL

Dear Mr. Christopher:

I am in receipt of your letter of January 3, 1991 regarding the Great Lakes Asphalt Site in which you expressed your dismay that the United States Environmental Protection Agency ("U.S.EPA") was "re-opening" the de minimis settlement in U.S. v. American Waste Processing, et al. and U.S. v. United Technologies Automotive, Inc.. It was your position that the definition of Covered Matters in the de minimis consent decree would preclude your clients liability for the Great Lakes Asphalt Site.

Enclosed is a copy of language that was proposed for inclusion in the de minimis consent decree by the de minimis parties. As you will noted, in Section VI, it states:

Except as otherwise provided in Section VII below, the United States covenants not to sue the De Minimis Settling defendants with regard to "Covered Matters". For purposes of Section VI., "Covered Matters" shall refer to any liability that could be imposed upon any of them with respect to or in any way arising from the Site under Section 106 or 107 of CERCLA . . . and all other claims available under any state or federal statute or regulation or under common law (except as specifically exempted below), including without limitation, obligations or liability arising from off-site contamination which may have resulted from the disposal of waste material at the Site, obligations or liability arising from actions or omissions of the persons conducting or funding the remediation of the Site or their contractors, and obligations or liability arising from the Site by persons conducting or funding the remediation of the Site or their contractors and placement or disposal of such wastes or contaminated materials at any other site.

The underlined language was proposed for inclusion by the de minimis parties. However, it was rejected by the U.S. EPA and was not included in the consent decree. Thus, by its rejection of the above quoted language, it is evident that it was not the intent of the U.S. EPA to release the de minimis parties for any potential liability that they may have at the Great Lakes Asphalt Site. If you are aware of any U.S. EPA employee who represented to you or to any other de minimis party that the settlement was to include a release for the Great Lakes Asphalt Site, please provide me with this individual's name. Upon obtaining such information, I would be willing to reconsider your position. Absent such information, U.S. EPA's rejection of the above quoted language clearly demonstrates that the covenant not to sue in the de minimis consent decree was not intended to exclude potential liability for the Great Lakes Asphalt site.

You also stated in your letter that you were shocked to receive this letter since the Great Lakes Asphalt Site is not on the NPL and your company did not receive a Section 104(e) information request regarding the Site. As you no doubt aware, U.S. EPA's role and mission is not limited to those Site that are listed on the NPL. Further, as you are also no doubt aware, the release at this Site was sudden, necessitating U.S. EPA's immediate response. The first concern of the U.S. EPA was responding to the release, not issuing 104(e) requests. Subsequently, U.S. EPA has learned that the source of the material that was released at the Site was from the Enviro-Chem Site. There was no need, and indeed, there is no requirement, for the U.S. EPA to issue Section 104(e) to companies to confirm that fact. While a Section 104(e) request may be the usual first step, it is not a required step when the information is already known.

In your letter you also raise the issue of various other defenses to liability including section 107(a) and (b)(3) of CERCLA. With regard to the Section 107(b)(3) defense, as you are no doubt aware, a defendant bears the burden of proving each element of this defense. It is U.S. EPA's position that the defendants may not be able to meet this burden and thus would not be entitled to the defense. With regard to the scope of 107(a), U.S. EPA believes that the definition of a generator of hazardous waste covers the factual scenario of this case.

Therefore, based on the above information, it is the U.S. EPA's position that the de minimis consent decree does not exempt or preclude the settling de minimis parties from liability at the Great Lakes Asphalt Site, and that the applicability of the defense of Section 107(b)(3) is not certain. The position that your client will take is obviously a matter for your mutual decision and analysis. This letter is merely to inform you of U.S. EPA's position as to the claims raised in your letter.

You also believe that U.S. EPA has ignored Section 122 of CERCLA. Since you do not cite a particular section of 122, I

assume it is your position that U.S. EPA has "ignored" the entire Section. However, the very letter that you were responding to asks if you wish to discuss settlement. That is what the U.S. EPA is engaged in at this time. No litigation has yet been filed as we are attempting to resolve this issue through negotiations.

Lastly, in your letter, you made a settlement offer of \$486.64. At this time, the U.S. EPA has been informed that various attorneys have formed a steering committee to see if a settlement of this matter can be reached. If we can not reach a settlement with the committee, we would than negotiate individually with each company that would so desire. Therefore, at this time, we would ask that you refer your settlement proposal to Peter Racher of Plews & Shadley, (317) 637-0700. If we can not receive a settlement with the committee, we would than negotiate individually with each company that would so desire.

If you have any further questions regarding the Great Lakes Asphalt Site, please feel free to contact me.

Sincerely,



Peter M. Felitti
Assistant Regional Counsel

Enclosure